

ARGUMENT.....6

I. EPA HAS VIOLATED SECTION 7(A)(2) BY FAILING TO CONSULT WITH NMFS ON THE EFFECTS OF ITS PESTICIDE REGISTRATIONS ON LISTED SALMON AND STEELHEAD AND THEIR CRITICAL HABITAT..... 6

A. EPA Must Consult With NMFS on its Actions that May Affect Listed Species or Their Critical Habitat..... 6

B. EPA's Pesticide Registrations are Federal Agency Actions Subject to Section 7(a)(2).....8

1. The ESA defines "agency action" broadly to include licenses over which the agency retains some control.....8

2. Pesticide registrations are "agency actions" subject to Section 7(a)(2).....9

C. EPA Has Not Consulted With NMFS to Ensure That Its Pesticide Registrations Will Not Jeopardize Listed Salmon and Steelhead or Adversely Modify Their Critical Habitat.....11

D. Numerous Pesticide Registrations May Adversely Affect Listed Salmon and Their Critical Habitat and Thereby Must Undergo Section 7(a)(2) Consultation.....14

1. Scientific Evidence Shows that Pesticides May Adversely Affect Salmon and Their Habitat.....14

2. Surface Water Monitoring Has Detected Pesticides Above Levels That Government and Scientific Authorities Have Established to Protect Aquatic Life.....16

3. EPA Has Made Findings that Particular Pesticide Uses are Likely to Result in Concentrations that Exceed the Levels of Concern that EPA Has Established for Fish and Their Habitat.....17

E. This Court Should Order EPA to Initiate Formal Consultations on Pesticides That Have Well-Documented Risks.....19

II. EPA HAS FAILED TO CONSULT WITH NMFS UNDER SECTION 7(A)(1) TO ENSURE THAT IT IS UTILIZING ITS PROGRAMS TO CONSERVE LISTED SALMON AND STEELHEAD.....20

A. EPA Has a Duty Under Section 7(a)(1) to Consult With NMFS on Utilizing its Authorities to Conserve Listed Salmon and Steelhead.....20

B. EPA Has Violated Its Section 7(a)(1) Consultation Duty.....21

CONCLUSION.....24

TABLE OF AUTHORITIES

CASES

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989).....7, 8

Defenders of Wildlife v. Administrator, EPA,
882 F.2d 1294 (8th Cir. 1989).....5, 11

Lane County Audubon Society v. Jamison,
958 F.2d 290 (9th Cir. 1992).....8

Natural Resources Defense Council v. Houston,
146 F.3d 1118 (9th Cir. 1998), cert. denied, 119 S.Ct. 1754 (1999).....8, 9

Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation,
2001 WL 360146 (N.D. Ca 2001).....12, 13

Pacific Rivers Council v. Thomas,
30 F.3d 1050 (9th Cir. 1994), cert. denied, 514 U.S. 1082 (1995).....8, 9

Pyramid Lake Paiute Tribe v. U.S. Department of Navy,
898 F.2d 1410 (9th Cir. 1990).....21

Sierra Club v. Babbitt,
65 F.3d 1502 (9th Cir. 1995)..... 9

Sierra Club v. Glickman,
156 F.3d 606 (5th Cir. 1998)..... 21

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978).....9, 20, 21

Thomas v. Peterson,
753 F.2d 754 (9th Cir. 1985)..... 7

STATUTES

Federal Insecticide, Fungicide & Rodenticide Act

7 U.S.C. § 136a(a).....4

7 U.S.C. § 136a(c)(5).....	4, 5
7 U.S.C. § 136a(g)(2).....	22
7 U.S.C. § 136d(a)(2).....	22
7 U.S.C. § 136d(b).....	10
7 U.S.C. § 136d(c).....	5, 10

Endangered Species Act

16 U.S.C. § 1531(b).....	20
16 U.S.C. § 1531(c).....	20
16 U.S.C. § 1532(2).....	21
16 U.S.C. § 1532(3).....	20
16 U.S.C. § 1533(d).....	2
16 U.S.C. § 1536(a).....	7
16 U.S.C. § 1536(a)(1).....	20
16 U.S.C. § 1536(a)(2).....	7, 8
16 U.S.C. § 1536(b).....	7
16 U.S.C. § 1536(b)(3)(A).....	7
16 U.S.C. § 1536(o).....	7

Clean Water Act

33 U.S.C. § 1313(4)(2).....	22
33 U.S.C. § 1314(a).....	22

RULES, REGULATIONS & REGULATORY MATERIALS

Fed. R. Civ. P. 56(c).....	1
----------------------------	---

40 C.F.R. § 125.62.....	22
50 C.F.R. § 402.02.....	8, 9, 14
50 C.F.R. § 402.03.....	8
50 C.F.R. § 402.13.....	7, 14
50 C.F.R. § 402.14.....	7
50 C.F.R. § 402.14(a).....	13, 14
50 C.F.R. § 402.14 (c).....	12
50 C.F.R. § 402.14(g)-(h).....	7
50 C.F.R. § 402.14(g)(6).....	7
50 C.F.R. § 402.14(h)(3).....	7
50 C.F.R. § 402.16.....	8
54 Fed. Reg. 27,984 (1989).....	11, 17, 18, 23
56 Fed. Reg. 58,619 (Nov. 20, 1991).....	2
57 Fed. Reg. 14,653 (1992).....	2
58 Fed. Reg. 33,212 (1993).....	2
59 Fed. Reg. 440 (1994).....	2
59 Fed. Reg. 57,178 (1994).....	11
59 Fed. Reg. 57,197 (1994).....	11
61 Fed. Reg. 56,138 (1996).....	2
62 Fed. Reg. 24,588 (1997).....	2
62 Fed. Reg. 43,937 (1997).....	2

63 Fed. Reg. 13,347 (1998).....	2
63 Fed. Reg. 42,587 (1998).....	2
64 Fed. Reg. 14,308 (1999).....	2
64 Fed. Reg. 14,508 (1999).....	2
64 Fed. Reg. 14,517 (1999).....	2
64 Fed. Reg. 14,528 (1999).....	2
64 Fed. Reg. 24,049 (1999).....	2
64 Fed. Reg. 50,394 (1999).....	2
65 Fed. Reg. 7777-7779 (2000).....	2
65 Fed. Reg. 36,074 (2000).....	2
65 Fed. Reg. 42,422 (July 10, 2000).....	3, 12, 14

INTRODUCTION

This case challenges the Environmental Protection Agency's ("EPA's") failure to comply with its Endangered Species Act ("ESA") obligations with respect to its pesticide registrations and programs that impact threatened and endangered salmon and steelhead. At the heart of this case is EPA's complete failure to initiate formal consultation with the National Marine Fisheries Service ("NMFS") under either Section 7(a)(1) or 7(a)(2) regarding its pesticide registrations or programs, despite the passage of more than ten years since the first ESA listing of salmon.

In this motion, plaintiffs Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (collectively referred to as "Toxics Coalition") seek a declaration that EPA has violated its Section 7 obligations to consult with NMFS with respect to its pesticide registrations and programs. Toxics Coalition also seeks an order directing EPA to commence such consultations forthwith on registered pesticides uses for which readily available toxicity, detection, and usage data document a clear threat to listed salmon and steelhead.

Summary judgment is appropriate because "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In support of this motion, Toxics Coalition is submitting the declarations of Richard D. Ewing and Aimee Code, supporting exhibits, and a proposed order.¹

BACKGROUND

I. ESA PROTECTIONS FOR IMPERILED SALMON AND STEELHEAD

Native salmon and steelhead once thrived in the Pacific Northwest, but their populations are now declining at an alarming rate. NMFS began listing salmon in 1989 with the emergency listing of the Sacramento winter run chinook as threatened, a listing that was subsequently upgraded to endangered in 1994. Since that time, NMFS has listed 25 evolutionarily significant units (or "ESUs") of salmon and steelhead throughout much of the Pacific Northwest.² NMFS has designated critical habitat for all of the listed ESUs, except the Northern California steelhead.³

The decline of salmon and steelhead has been due to many factors, including the degradation of freshwater habitat needed for spawning and rearing. Pesticide use is one cause of such habitat degradation. Indeed, in issuing its recent salmon and steelhead protection rule under the ESA, 16 U.S.C. § 1533(d), NMFS identified pesticide use as an activity that may kill or injure salmonids and noted that "concentrations of pesticides may affect salmonid behavior and reproductive success." NMFS further acknowledged that: "Current EPA label requirements were developed in the absence of information about some of these subtle but real impacts on aquatic species such as salmonids" and that research is needed into the sublethal, synergistic, cumulative effects of pesticides and their inert ingredients on salmonids. 65 Fed. Reg. 42,422, 42,427, 42,456-57, 42,473 (July 10, 2000).

In recent surveys, the U.S. Geological Survey ("USGS") has found concentrations of pesticides in Pacific Northwest and California rivers and streams at or above levels that are associated with detrimental impacts to salmon and their habitat. Some detections were found in areas affected by agricultural pesticide uses, while others were found in urban and suburban areas as a result of home and garden and other non-agricultural pesticide uses. In many instances, the detections were above levels set by EPA or other governmental or scientific authorities to protect aquatic life from chronic exposure to those pesticides. See Water Quality in the Puget Sound Basin, Washington and British Columbia, 1996-1998 (2000); Pesticides in Selected Small Streams in the Puget Sound Basin, 1987-1995 (1997); Water Quality in the Willamette Basin, Oregon, 1991-1995 (1998); Distribution of Dissolved Pesticides & Other Water Quality Constituents in Small Streams, & their Relation to Land Use, in the Willamette River Basin, Oregon, 1996 (1997); Water Quality in the San Joaquin-Tulare Basins, California, 1992-1995 (1998); Water Quality in the Sacramento River Basin, California, 1994-1998 (2000). These reports are attached as Exhibits 4-8 to the Declaration of Richard D. Ewing, Ph.D (April 2001)

and Exh. 46-47 to the Declaration of Aimee Code, M.S. (April 2001).

II. EPA'S PESTICIDE REGISTRATION AUTHORITY

EPA is charged with regulating the nationwide sale and use of pesticides to avoid unreasonable adverse effects on health and the environment. Under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), a pesticide may generally not be sold or used in the United States unless it has an EPA registration and approved label authorizing that use. 7 U.S.C. § 136a(a). EPA may register a pesticide for a particular use only if it determines: (1) that the labeling complies with FIFRA's requirements; (2) that the composition claims are warranted; (3) that the pesticide will perform its intended function; and most importantly, (4) that the particular use will not cause unreasonable adverse effects on health or the environment. *Id.* § 136a(c)(5). The culmination of the registration process is EPA's approval of a label for uses of a particular pesticide on specific crops often limited geographically, seasonally, or based on site conditions. FIFRA makes it unlawful to use a pesticide in a manner inconsistent with the label. *Id.* § 136j(2)(G).

As part of the registration process, EPA must classify each pesticide formulation as general or restricted use, depending on risks posed to human health and the environment. *Id.* § 136a(d)(1)(C). Restricted use pesticides are subject to additional regulatory restrictions, such as limiting the purchase and application of the pesticide to licensed applicators and imposing other constraints on its application and use. *Id.* EPA must reclassify pesticides as restricted use pesticides where necessary to prevent unreasonable adverse effects to health or the environment, including threatened and endangered species. *Id.* § 136a(d)(1)(C)(2).

After approving a pesticide registration, EPA retains discretionary involvement and control over that registration. EPA must periodically review pesticide registrations with the goal of reviewing each pesticide registration every 15 years. *Id.* § 136a(g)(1). EPA has the authority to compel registrants to submit data necessary for a reregistration review. *Id.* § 136a(g)(2). Even apart from such explicit data submission requirements, registrants must submit to EPA any information about registered pesticides' unreasonable adverse effects on health or the environment. *Id.* § 136d(a)(2). EPA takes such information into account in reviewing and, where necessary, modifying pesticide registrations.

EPA is in the midst of a lengthy process of systematically reregistering pesticides that have been on the market for years and often decades prior to enactment of current environmental registration requirements. *Id.* § 136a-1. Congress added environmental standards to FIFRA in 1972, yet EPA still has not assessed thousands of pesticide products under these standards nearly 30 years later. As part of a reregistration determination, EPA is required to impose restrictions on uses of pesticides that cause unreasonable health or environmental effects, including those uses that harm threatened or endangered species.

The EPA Administrator has the authority, indeed the duty, to cancel pesticide registrations whenever "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." *Id.* § 136d(b); *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1296 (8th Cir. 1989) ("If, at any time, the EPA believes a registered pesticide fails to meet this standard, the EPA may initiate an administrative process to cancel the registration"). The Administrator may immediately suspend a pesticide registration to prevent an imminent hazard. 7 U.S.C. § 136d(c). Action by EPA toward canceling pesticide uses often results in the registrant's voluntary cancellation of, or agreement to further constraints upon, that use. For example, when EPA's regulatory review of diazinon documented excessive risks to human health and presaged the prospect of cancellations, the company that holds the registration for diazinon (the "registrant") agreed to phase out certain diazinon uses. *See* EPA, Diazinon Revised Risk Assessment & Agreement with Registrants (Jan. 2001) (Exh. 1 to Goldman Decl.). Similarly, the maker of chlorpyrifos agreed to eliminate and phase out certain uses of that pesticide rather than face EPA cancellation proceedings due to excessive risks. *See* EPA, Chlorpyrifos Revised Risk Assessment & Agreement With Registrants (June 2000) (Exh. 2 to Goldman Decl.).

ARGUMENT

For federal activities, the heart of the ESA is Section 7, which prescribes two sets of obligations. First, under Section 7(a)(2), federal agencies must ensure that their actions are not likely to jeopardize the continued existence of any threatened or endangered species or adversely modify such species' designated critical habitat. Second, under Section 7(a)(1), federal agencies must review and utilize their programs to conserve listed species. EPA must undertake both of these obligations in consultation with the pertinent expert fish and wildlife agency, which is NMFS in the case of marine species, including salmon and steelhead. EPA has failed to discharge either Section 7 obligation; indeed, it has not even begun the formal consultations that constitute the essential first step toward satisfying these duties.

I. EPA HAS VIOLATED SECTION 7(A)(2) BY FAILING TO CONSULT WITH NMFS ON THE EFFECTS OF ITS PESTICIDE REGISTRATIONS ON LISTED SALMON AND STEELHEAD AND THEIR CRITICAL HABITAT.

A. EPA Must Consult With NMFS on its Actions that May Affect Listed Species or Their Critical Habitat.

Section 7(a)(2) imposes a substantive obligation on federal agencies to ensure that their actions will not jeopardize the survival and recovery of listed species or adversely modify such species' critical habitat. To assist federal agencies in meeting this charge, Section 7(a)(2) establishes a mandatory interagency consultation process. Specifically, federal agencies, like EPA, must consult with the appropriate expert fish and wildlife agency before undertaking

actions that may cause jeopardy to listed species. The Ninth Circuit has emphasized repeatedly that strict compliance with the ESA's consultation process is essential to the success of the ESA, because only through the consultation process can the effects of agency actions on listed species be fully and objectively evaluated. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).

The end product of formal consultation is a biological opinion in which NMFS determines whether the action will jeopardize the survival and recovery of listed species or will adversely modify the species' critical habitat. 16 U.S.C. § 1536(b). In order to make this determination, NMFS must use the best available scientific information and provide a detailed evaluation of the action's effects on the listed species. Id. 1536(a)(2) and (b)(3)(A); 50 C.F.R. § 402.14(g)-(h). If NMFS determines that the action is likely to jeopardize the species, the biological opinion must specify reasonable and prudent alternatives that will avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). NMFS must also formulate discretionary conservation recommendations to reduce or minimize the action's impacts on listed species or critical habitat. Id. § 402.14(g)(6). Not only does a Section 7(a)(2) consultation assist the action agency in discharging its duty to avoid jeopardy, but the biological opinion also determines whether to authorize the incidental take of listed species through the issuance of an incidental take statement, which insulates the federal agency from liability for a take of a threatened or endangered species, provided the agency complies with the statement's terms and conditions. 16 U.S.C. § 1536(o).

Under this framework, federal actions that may affect a listed species may not proceed until the federal agency ensures, through completion of the consultation process and implementation of the results, that the action will not cause jeopardy. See 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; Conner v. Burford, 848 F.2d 1441, 1455 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989).

B. EPA's Pesticide Registrations are Federal Agency Actions Subject to Section 7(a)(2).

1. The ESA defines "agency action" broadly to include licenses over which the agency retains some control.

Under the ESA, an "agency action" subject to the consultation duty is defined as "any action authorized, funded, or carried out by" a federal agency. 16 U.S.C. § 1536(a)(2). The joint NMFS and Fish and Wildlife Service implementing regulations further define "agency actions" broadly as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States," including, but not limited to, "the promulgation of regulations, and the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid, or actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (definition of "action"). The Ninth Circuit has likewise interpreted the term "agency action" broadly. See, e.g., Natural Resources Defense Council v. Houston, 146 F.3d

1118 (9th Cir. 1998), cert. denied, 119 S.Ct. 1754 (1999) (water contract renewals); Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992) (forest management plans); Connor v. Burford, 848 F.2d at 1452 (oil and gas leases).

Section 7 applies not only to new actions but also to ongoing actions over which the agency retains some "discretionary Federal involvement or control" or where such control is authorized by law. 50 C.F.R. §§ 402.03, 402.16. Adhering to this principle, the Ninth Circuit held in Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053-56 (9th Cir. 1994), cert. denied, 514 U.S. 1082 (1995), that the U.S. Forest Service had to reinitiate consultation on its forest plans governing logging, roadbuilding, and grazing activities that may affect the then newly listed Snake River salmon. According to the court, "because the [plans] have an ongoing and long-lasting effect even after adoption, we hold that the [plans] represent ongoing agency action." Id. at 1053. This holding rejected the Forest Service's contention that it need only consult on the plans when they are adopted or revised. Id.

In so holding, the court relied on Tennessee Valley Authority ("TVA") v. Hill, 437 U.S. 153, 173 (1978), which applied Section 7(a)(2) to a dam whose construction was well underway when Congress enacted the ESA. Pacific Rivers Council, 30 F.3d at 1054-55. In TVA, the Supreme Court enjoined TVA's operation of the dam because it constituted "agency action" that had to comply with Section 7(a)(2). In the Court's view, the Section 7(a)(2) directive "admits of no exception," thereby eviscerating TVA's contention that it need not comply with respect to dam construction that began before the ESA's passage. 437 U.S. at 173.

Revisiting this issue in Natural Resources Defense Council v. Houston, 146 F.3d at 1125-26, the Ninth Circuit held that the negotiation and execution of water service contract renewals constituted agency actions subject to ESA § 7(a)(2) consultation. Under the controlling laws, the federal agency retained the authority to modify the contracts to protect the listed species. Cf. Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) (agency need not consult on a 1962 right-of-way agreement where agency lacked discretion to modify the project to protect the species at issue). It is well-settled that federal agencies must consult on ongoing actions that may affect listed species where the agency retains discretionary control or authority to modify the action to lessen adverse effects on the listed species at issue.

2. Pesticide registrations are "agency actions" subject to Section 7(a)(2).

Pesticide registrations are unquestionably agency actions subject to Section 7(a)(2). As actions authorized and carried out by EPA, they fall squarely within the plain language of Section 7(a)(2). Moreover, they constitute licenses, which are named explicitly in the regulatory definition of "agency actions" subject to Section 7(a)(2) consultations. 50 C.F.R. § 402.02.

FIFRA allows pesticides to be registered only for those uses that do not cause unreasonable health and environmental effects. This requirement is not static. It continues to apply to

pesticide uses long after EPA has made an initial registration determination.

Indeed, EPA retains significant authority over pesticide registrations once they are established. Specifically, the Administrator has the authority to cancel pesticide registrations whenever "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b); see also id. § 136d(c) (authority to suspend pesticide registrations to prevent imminent hazards during the cancellation process). To assist EPA in exercising this authority, FIFRA requires registrants to submit any information disclosing adverse effects from the registered uses of pesticides, and EPA has established more particularized data submission obligations to assist it in reviewing registered pesticide uses. Id. § 136d(a)(2); 40 C.F.R. pt. 158.

Moreover, in 1972, EPA began assessing and reregistering pesticides that came on the market and obtained EPA approval before FIFRA was amended to add environmental requirements. See id. § 136b. EPA is still in the process of reregistering old pesticide uses to bring them into compliance with current environmental standards. Code Decl. ¶¶ 6, 8.

EPA has ample authority and control over pesticide registrations to modify them to protect listed salmonids. Therefore, existing pesticide registrations are agency actions subject to Section 7(a)(2).

This proposition is beyond reproach. EPA concedes that the ESA "requires that EPA ensure that registered uses of pesticides will not jeopardize the continued existence or destroy or adversely modify the critical habitat of federally-listed endangered or threatened species (listed species). Section 7 of the ESA imposes requirements on EPA to consult with the U.S. Fish and Wildlife Service (for most species) or the U.S. National Marine Fisheries Service (for marine species) if the use of a pesticide "may affect" a listed species or its critical habitat." 59 Fed. Reg. 57,178, 57,197 (1994). EPA likewise recognizes that "[t]his duty extends to licensing activities, such as the registration of a pesticide by EPA." 54 Fed. Reg. at 27,984 (1989).

In keeping with this obligation, EPA has consulted with the U.S. Fish and Wildlife Service on the effects of some registered pesticide uses on non-marine species, although these consultations have been plagued by incessant delays and little, if any, implementation. See 54 Fed. Reg. 27,984 (1989) (describing consultations); see also Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294 (8th Cir. 1989) (eventually consulting on impacts of strychnine registration on black-footed ferrets).⁴

Under the plain language of Section 7(a)(2), the ESA implementing regulations, and consistent Ninth Circuit precedent, EPA's existing pesticide registrations are agency actions that must undergo Section 7(a)(2) consultation.

C. EPA Has Not Consulted With NMFS to Ensure That Its Pesticide Registrations Will Not Jeopardize Listed Salmon and Steelhead or Adversely Modify Their Critical Habitat.

Despite the passage of more than ten years since the first salmonid listing, EPA has not initiated, let alone completed, formal consultations with NMFS under Section 7(a)(2) regarding any of its pesticide registrations. When NMFS promulgated salmon and steelhead regulations last July, it confirmed that "[c]urrently, EPA has not consulted with NMFS on the use of pesticides and their impact on listed anadromous fish and their habitat." 65 Fed. Reg. 42,444, 42,457 (July 10, 2000).

In its answer in this case, EPA asserts that it "is in the process of consulting with the National Marine Fisheries Service (NMFS) on the impact of pesticide registrations on all Pacific salmon and steelhead species." Answer ¶ 42. EPA does not claim that it has initiated formal consultations on any particular registered pesticide uses. Nor could it credibly make such a claim. Under the joint NMFS/Fish and Wildlife Service regulations, an action agency, like EPA, initiates formal consultation by submitting a written request for consultation on a particular action, here a particular pesticide registration, along with a description of its impacts on listed species and their habitat. 50 C.F.R. § 402.14 (c). The action agency generally initiates consultation by submitting a biological assessment. *Id.* § 402.12. Whatever form the initiation takes, it must soon be followed by transmittal of all relevant available information. *Id.* § 402.14(c) (6). Engaging in vague dialogue about pesticide impacts or preliminary discussions about how to conduct formal consultations does not discharge EPA's statutory duties.

Indeed, a federal district court recently chastised another federal agency for delaying initiation of consultation on an action that clearly is likely to adversely affect listed species and therefore to warrant formal consultation. In Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 2001 WL 360146 *13 (N.D. Cal. April 3, 2001), the court explained, "the Bureau cannot avoid formal consultation indefinitely by postponing the preparation of, or simply failing to complete, a biological assessment. Such a result would render meaningless the consultation requirement and would be completely at odds with the clear mandate of the ESA, which placed a national priority on halting and reversing the trend toward species extinction." Instead, federal agencies must review their actions and seek consultation "at the earliest possible time." *Id.*, quoting 50 C.F.R. § 402.14(a).

Instead of ensuring that its ongoing actions comply with Section 7, EPA has a track record of proceeding with business as usual without integrating the ESA into that business. It has yet to finalize its endangered species protection program first proposed in the 1980s and has postponed imposing any limits on pesticide use to protect listed salmon until it makes the program final at some unspecified point in the future. As EPA has repeatedly explained when it identifies unacceptable risks to listed species from particular pesticide uses:

The Endangered Species Protection Program is expected to become final at sometime in the future. Limitations in the use of chlorothalonil may be required at that time to protect

endangered and threatened species, but these limitations have not been defined and may be formulation-specific. EPA anticipates that a consultation with the Fish and Wildlife Service may be conducted in accordance with the species-based priority approach described in the Program. After completion of the consultation, registrants will be informed if any required label modifications are necessary. Such modifications would most likely consist of a generic label statement referring pesticide users to use limitations contained in county bulletins.

E.g., Code Decl. Exh. 12 at 153 (chlorothalonil); Code Decl. ¶ 35. As this boilerplate explanation confirms, EPA routinely puts off ESA consultations to some indefinite time "in the future."

To compound its disregard of Section 7(a)(2), EPA is making critical reregistration determinations on pesticides that adversely affect salmonids without consulting with NMFS on the underlying or resulting registrations. For example, EPA recently reached an agreement with registrants to phase-out some uses of diazinon in response to human health concerns. See Goldman Decl. Exh. 1. EPA took this action without ever consulting with NMFS on diazinon's impacts on salmon, despite diazinon's alarming adverse effects on salmon. See Code Decl. Exh. 49 at 103-04.

D. Numerous Pesticide Registrations May Adversely Affect Listed Salmon and Their Critical Habitat and Thereby Must Undergo Section 7(a)(2) Consultation

An agency must initiate consultation under Section 7 whenever it undertakes an action (or continues an ongoing action) that "may affect" a listed species or critical habitat. See 50 C.F.R. § 402.14(a). Conversely, an agency is relieved of the obligation to consult on its actions only where the action will have "no effect" on listed species or designated critical habitat.⁵

There can be no question that many registered pesticide uses "may affect" listed salmonids and/or their critical habitat. Indeed, NMFS concluded in its recent salmon and steelhead protection rule that pesticide concentrations "may affect salmonid behavior and reproductive success." 65 Fed. Reg. at 42,473.

1. Scientific Evidence Shows that Pesticides May Adversely Affect Salmon and Their Habitat

A growing body of scientific evidence documents a wide array of pesticide impacts on salmon and their habitat. These impacts range from mortalities to sublethal effects to salmon to indirect effects on salmon food sources and habitat.

Many EPA-registered pesticides are acutely toxic to fish, aquatic invertebrates, and plants. The acute toxicity studies registrants must submit to EPA demonstrate significant risks to aquatic species. See infra at 17-18. Moreover, EPA reviews document fish kills from registered pesticide uses. See, e.g., Code Decl. Exh. 12 at 143-44 (chlorothalonil); Code Decl. Exh. 34 at 9-10 (fenamiphos); Code Decl. Exh. 33 at 48-49 (ethoprop).

Salmon also may be adversely affected by concentrations of pesticides at doses far lower than those that cause mortality. Sublethal doses can cause damage to salmon by impeding their ability to feed, avoid predators, and seek out optimum temperatures, as well as by disrupting their immune systems and their sexual development. Ewing Decl. ¶¶ 9-15; see Code Decl. Exh. 33 at 48 (EPA notes that "[v]ery high acute and chronic risks to freshwater and estuarine invertebrates may produce food chain effects which may impact fish and other organisms that depend on invertebrates as a significant portion of their diet"). Such disruptions can cause disease, impaired reproduction function, and increased mortalities. Ewing Decl. ¶¶ 9, 11-15.

Sublethal concentrations of pesticides also can indirectly harm salmon by interfering with their food supply or altering aquatic habitat. Such indirect effects include reducing the abundance of adult insects, insect larvae, and other invertebrates on which the fish depend for their nourishment and growth. Id. ¶ 17. Removal of aquatic and riparian vegetation can decrease cover, making juvenile fish more susceptible to predation and altering the aquatic environment by, for example, increasing temperatures to levels that increase the risk of disease. Id. ¶ 18; see Code Decl. Exh. 7 at 188 (EPA noting "[b]ased on the aquatic plant data [showing toxicity], the Agency [EPA] is confident that adverse effects on aquatic ecosystems, including potential for population level effects on aquatic animals, will occur").

Sublethal and indirect effects can be very significant, "sublethal concentrations may prove more deleterious than lethal concentrations" and Dr. Richard Ewing, a fish biologist who has reviewed the impacts of pesticides on salmon, has concluded that:

[I]ndirect effects can be even more important than direct effects. For this reason, the impacts of pesticides on aquatic insects, invertebrates, and plants may be better indicators of aquatic ecosystem health than the direct effects on salmon.

Ewing Decl. ¶¶ 9, 19, and Exh. 3.

2. Surface Water Monitoring Has Detected Pesticides Above Levels That Government and Scientific Authorities Have Established to Protect Aquatic Life.

Recent surface water monitoring studies have found concentrations of pesticides in salmon streams above levels associated with detrimental impacts to salmon and their habitat. During the 1990s, the U.S. Geological Survey ("USGS") conducted National Water Quality Assessment ("NAWQA") surveys in river basins throughout the country. Four study units coincide with or overlap critical habitat designated for listed salmon or steelhead: the Willamette Basin in Oregon, Puget Sound in Washington, and the San Joaquin-Tulare and Sacramento Basins in California. Ewing Decl. ¶¶ 24-25; Code Decl. Exh. 46-47.

In its published water quality assessments for these basins, USGS reported detections of numerous pesticides in one or more of the basins with a significant number of pesticides

showing up in 20% or more of the samples tested. Code Decl. ¶¶ 22-23 and Exh. 2. Given that USGS surveyed for only a subset of registered pesticides, the findings may be only the tip of the iceberg. Ewing Decl. ¶ 25.

Of particular relevance for this case, USGS compared the concentrations detected in surface water with aquatic life criteria that have been established by governmental and scientific authorities for the particular pesticide. USGS found concentrations of the following 13 pesticides above a recognized standard established to protect aquatic life:⁶

- | | | |
|--------------------|-----------------|-----------------|
| 1. 2,4-D | 6. chlorpyrifos | 11. metribuzin |
| 2. atrazine | 7. diazinon | 12. simazine |
| 3. azinphos-methyl | 8. dicamba | 13. trifluralin |
| 4. carbaryl | 9. diuron | |
| 5. carborfuran | 10. malathion | |

These findings are particularly striking given that relatively few aquatic life criteria have been established for pesticides. Ewing Decl. ¶ 28.

Because these pesticides have been detected in or near salmon streams at levels above aquatic life criteria, they clearly are likely to adversely affect listed salmon and their habitat. EPA, therefore, has an unequivocal duty to consult with NMFS on these pesticide registrations.

3. EPA Has Made Findings that Particular Pesticide Uses are Likely to Result in Concentrations that Exceed the Levels of Concern that EPA Has Established for Fish and Their Habitat.

As part of the reregistration process, EPA is assessing the health and environmental impacts of thousands of old pesticides products under current environmental standards. With respect to endangered species' impacts, EPA assesses the ecological risks from the predicted environmental concentrations of the pesticides when used in accordance with the approved registrations and labels. Based on toxicity studies, EPA establishes regulatory levels of concern for fish, aquatic invertebrates, and aquatic plants. 54 Fed. Reg. at 28,003. It has established more stringent regulatory levels of concern for threatened and endangered species because "listed species may not be able to withstand even the loss of a few individuals in the population." *Id.* at 28,004; *accord id.* at 27,992 ("Since the population of a listed species is generally already significantly reduced, the population is likely to be more susceptible to additional environmental stresses, in addition to habitat loss, than are non-listed species"). EPA then estimates the environmental concentrations in water from the pesticide use to determine

whether its regulatory levels of concern will be exceeded. Id.; Code Decl. ¶¶ 12-17. An exceedance of a pertinent regulatory level of concern "confirms that a 'may affect' situation exists." 54 Fed. Reg. at 28,004.

For many pesticides, the estimated environmental concentrations result in exceedances of EPA's levels of concern for fish, aquatic invertebrates, and/or aquatic plants. Both in its overall description of its approach, and in the narrative accompanying these calculations, EPA has equated exceedances with "may affect" determinations that trigger Section 7(a)(2) consultation obligation. In its description of its endangered species program, EPA explained that "EPA conducts a risk assessment to arrive at a 'may affect' determination." 54 Fed. Reg. at 27,992. In assessing particular pesticides, EPA routinely draws the conclusion from exceedances of regulatory levels of concern that registered uses of the pesticide, for example, "may adversely affect endangered species of . . . freshwater fish (acutely and chronically)." E.g., Code Decl. Exh. 12 at 153 (chlorothalonil); Code Decl. ¶¶ 19-20.

The following chart identifies pesticides that EPA has concluded may result in concentrations that exceed its level of concern for fish, aquatic invertebrates, and/or aquatic plants. The chart is limited to pesticides that have been frequently detected in the USGS surveys in or near salmon habitat or that are commonly used in Washington, Oregon, or California.

Pesticides With EPA Findings That Aquatic Levels of Concern are Exceeded

1. alachlor	10. iprodione	19. tebuthiuron	28. fenamiphos
2. bensulide	11. methomyl	20. terbacil	29. metamidophos
3. bentazon	12. metolachlor	21. thiobencarb	30. methidathion
4. bromoxynil	13. norflurazon	22. thiodicarb	31. methyl parathion
5. captan	14. oryzalin	23. triclopyr	32. naled
6. chlorothalonil	15. paraquat dichloride	24. acephate	33. phorate
7. dichlobenil	16. pebulate	25. dimethoate	34. phosmet
8. 1,3-dichloropropene	17. pendimethalin	26. disulfoton	35. propargite
9. fenbutatin-oxide	18. prometryn	27. ethoprop	

Code Decl. ¶¶ 21-34.

EPA has concluded that use of these pesticides according to their current registrations and labels will result in concentrations that exceed its levels of concern for salmon and their habitat. Since EPA equates exceedances of its levels of concern with "may affect" findings, EPA has already determined that such pesticide uses may affect listed salmon, thereby triggering its duty to conduct formal consultations on these pesticide uses.

E. This Court Should Order EPA to Initiate Formal Consultations on Pesticides That Have Well-Documented Risks

The Toxics Coalition asks the Court to declare that EPA has unlawfully failed to comply with Section 7(a)(2) with respect to its pesticide registrations that impact listed salmon and steelhead. To bring itself into compliance with Section 7(a)(2), EPA will need to consult with NMFS on numerous pesticide uses and formulations.

Obviously, EPA cannot instantly correct its rampant violations of Section 7(a)(2). EPA can and should prioritize its consultations to accelerate review of pesticides that present the greatest risks to listed fish based on, for example, the toxicity of the pesticide (including acute, sublethal, and indirect aquatic effects) and the potential for the pesticide's presence in salmon habitat.

Given EPA's failure to initiate formal consultations on any pesticide registrations over the more than ten years since the first salmon were listed under the ESA, however, EPA should not be left to its own devices. Justice delayed will be justice denied in this case not only for the plaintiffs but also for the species at risk.

Therefore, to remedy EPA's violations of Section 7(a)(2), this Court should direct EPA to initiate formal Section 7 consultations on the two categories of pesticides that present well-documented risks to salmon and their habitat. First, the USGS water quality assessments detected 13 pesticides in salmon streams above recognized criteria that have been established for aquatic life. Ewing Decl. ¶¶ 25-27. Second, in the ordinary course of evaluating its pesticide registrations, EPA has made "may affect" determinations for 35 other pesticides that have been detected frequently in or near salmon habitat and/or that are commonly used in Washington, Oregon, and California. Code Decl. ¶¶ 21-34. All that remains to be done is EPA's initiation of the formal consultations that are unquestionably required. Accordingly, for these pesticides, this Court should direct EPA to commence formal consultation forthwith. For the remaining pesticide uses affecting salmon habitat, this Court should direct EPA to confer with the Toxics Coalition to develop a schedule and criteria for prioritizing Section 7 consultations.⁷

ii. epa has failed to consult with nmfs under section 7(a)(1) to ensure that it is utilizing its programs to conserve listed salmon and steelhead.

A. EPA Has a Duty Under Section 7(a)(1) to Consult With NMFS on Utilizing its Authorities to Conserve Listed Salmon and Steelhead

Section 7(a)(1) directs all federal agencies "in consultation with and with the assistance of the Secretary" to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). As defined under ESA § 3, the term "conservation" means to use all necessary methods and procedures to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary. Id. § 1532(3).

As the Supreme Court emphasized in TVA v. Hill, 437 U.S. at 180 (emphasis and ellipses in original):

As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such ... species" 16 U.S.C. § 1531(b) (1976 ed.). In furtherance of these goals, Congress expressly stated in § 2(c) that "all Federal departments and agencies shall seek to conserve endangered species and threatened species" 16 U.S.C. § 1531(c) (1976 ed.). Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Id. § 1532(2).

Section 7(a)(1) imposes an affirmative, pro-active duty that cannot be put on the back burner while agencies proceed with their other activities. Indeed, in Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1417 n.15 (9th Cir. 1990), the Ninth Circuit found that the ESA reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Accord TVA v. Hill, 437 U.S. at 185.

Under Section 7(a)(1), the Fifth Circuit upheld a district court order directing the U.S. Department of Agriculture to develop, in consultation with the Fish and Wildlife Service, "an organized program for the conservation of the ... endangered and threatened species as contemplated by the ESA." Sierra Club v. Glickman, 156 F.3d 606, 618 (5th Cir. 1998). The appellate court found that "§ 7(a)(1) contains a clear statutory directive (it uses the word 'shall') requiring the federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to the statute." Id. at 617.

Section 7(a)(1), like Section 7(a)(2), requires EPA to discharge its obligations "in consultation with and with the assistance of the Secretary." In other words, both subsections establish both

procedural and substantive obligations.

B. EPA Has Violated Its Section 7(a)(1) Consultation Duty

As with Section 7(a)(2), EPA has even not begun consulting with NMFS to determine how to utilize its programs to conserve listed salmon and steelhead, let alone discharged its substantive Section 7(a)(1) conservation duties.

The Fish and Wildlife Service recently expressed dismay at EPA's failure to take affirmative steps to protect listed species from pesticides. In a June 2000 letter, the Director of the Fish and Wildlife Service complained that EPA had not met its conservation obligations:

The Endangered Species Act should not be assigned the full responsibility for protecting threatened and endangered species. FIFRA and many other Federal laws and programs have substantive and procedural requirements that can protect listed species effectively if employed. Section 7 of the Act is clear that all of these authorities should be used, i.e., that conservation of listed species should be a shared responsibility.

Letter to Susan Wayland, Acting Assistant EPA Administrator from Jamie Rappaport Clark, Director, U.S. Fish & Wildlife Service (June 9, 2000) (Goldman Decl. Exh. 3).

EPA, indeed, has numerous programs that could be used to conserve salmon. For example, EPA has extensive authority under FIFRA to compel registrants to collect and submit information about the pesticide impacts on salmon habitat. 7 U.S.C. §§ 136a(g)(2), 136d(a)(2); 40 C.F.R. pt. 158. In many situations, EPA lacks data on pertinent impacts. See, e.g., Code Decl. Exh. 48 at 38-55 (EPA has no fully acceptable data to assess the toxicity of the herbicide triallate to aquatic plant species). Indeed, EPA fails to require the submission of data on certain types of impacts, such as the sublethal effects of pesticides to fish or the toxicity of mixes of pesticides even where "a potentially increased level of risk is possible for fish exposed to combined residues from runoff of this mixture." See, e.g., id. at 57. EPA could use its FIFRA authority to require registrants to submit additional data on the sublethal, indirect, or additive impacts of pesticides on salmon or to conduct surface water monitoring.

Similarly, EPA has the authority to establish aquatic life criteria under the Clean Water Act, 33 U.S.C. § 1314(a). Such criteria reflect the latest scientific knowledge regarding the effects of pollutants on the health and well-being of fish and other aquatic life. Id.; 40 C.F.R. § 125.62 (aquatic life criteria set "concentrations at which acute and chronic toxicity to aquatic life occurs"). Aquatic life criteria are used by states in establishing state water quality standards and in determining whether water bodies violate those standards and need corrective measures. 33 U.S.C. § 1313(4)(2); 1313(d); 40 C.F.R. § 125.62 (aquatic life criteria used to assess attainment or maintenance of water quality to assure the protection and propagation of a balanced indigenous fish populations). Unfortunately, few such criteria have been established for

pesticides, thereby making it difficult to identify and remedy pesticide pollution under the Clean Water Act. Ewing Decl. ¶ 28.

Rather than invoke these authorities to protect listed species, EPA has relegated species protection to its dormant endangered species program. Even though EPA outlined the program in the 1980's, its endangered species program is still in an embryonic stage. 54 Fed. Reg. 27,984 (1989). In theory, EPA proposes to impose use restrictions to protect threatened and endangered species by using pesticide labels to instruct users to adhere to county bulletins that impose such species-based use restrictions. Few such use restrictions have been developed to date, and EPA has yet to incorporate county bulletins into its mandatory label requirements.

To make matters worse, EPA has recently considered back tracking from mandatory use restrictions to protect threatened and endangered species. The Fish and Wildlife Service reacted negatively to this proposal, cautioning that "[u]nless EPA requires mandatory compliance with FIFRA-enforceable pesticide use limitations, there will be no certainty that our consultations on pesticides will result in protective measures for threatened and endangered species." FWS Letter at 1 (Goldman Decl. Exh. 3). EPA is even further behind with respect to marine species since it has not yet engaged in formal Section 7(a)(2) consultations to develop such use restrictions.

EPA could do far more to utilize its authorities to conserve salmon, yet it has not even taken the first statutorily-mandated steps. This Court should declare that EPA has violated Section 7(a)(1) by failing to review its programs that affect pesticide use and by failing to consult with NMFS to ensure that it utilizes its pesticide-related programs and authorities to conserve listed species. This Court should further order EPA to conduct such a review and commence such consultations.

CONCLUSION

For these reasons, the Court should declare that EPA has violated Section 7(a)(1) and (2) with respect to its pesticide registrations and programs and should direct EPA to commence consultations under both sections. Moreover, this Court should direct EPA to commence Section 7(a)(2) consultations forthwith on the following pesticide registrations:

1. 2,4-D	13. chlorpyrifos	25. malathion	37. pendimethalin
2. acephate	14. diazinon	26. metamidophos	38. phorate
3. alachlor	15. dicamba	27. methidathion	39. phosmet
4. atrazine	16. dichlobenil	28. methomyl	40. prometryn
5. azinphos-methyl	17. 1,3-dichloropropene	29. methyl parathion	41. propargite
6. bensulide	18. dimethoate	30. metolachlor	42. simazine
7. bentazon	19. disulfoton	31. metribuzin	43. tebuthiuron
8. bromoxynil	20. diuron	32. naled	44. terbacil
9. captan	21. ethoprop	33. norflurazon	45. thiobencarb
10. carbaryl	22. fenamiphos	34. oryzalin	46. thiodicarb
11. carborfuran	23. fenbutatin-oxide	35. paraquat dichloride	47. triclopyr
12. chlorothalonil	24. iprodione	36. pebulate	48. trifluralin

FOOTNOTES

1. Toxics Coalition is also submitting the declarations of Scott Dungan, Dahinda Meda, Matthew Ramsey, and Glen Spain, which attest to plaintiffs' standing to bring this case. Specifically, members of the plaintiffs organizations include commercial fishermen and sports fishing guides who depend on healthy salmon populations for their livelihood, individuals who manage their lands, at significant personal expenditure of time and money, to contribute to salmon recovery, and individuals who obtain substantial enjoyment from observing salmon in their regular hiking, rafting, canoeing, and other recreational activities. Their ability to engage in these activities is impaired by harm to salmon populations from pesticide uses authorized by EPA.

2. 59 Fed. Reg. 440 (1994) (endangered Sacramento winter-run chinook); 56 Fed. Reg. 58,619 (Nov. 20, 1991) (endangered Snake R. sockeye); 57 Fed. Reg. 14,653 (1992) (threatened Snake R. fall-run and spring/summer-run chinook); 61 Fed. Reg. 56,138 (1996) (threatened Central CA coho); 62 Fed. Reg. 43,937 (1997)

(threatened Snake, Central CA Coast, and South-Central CA Coast steelhead; endangered Upper Columbia and S. CA steelhead); 62 Fed. Reg. 24,588 (1997) (threatened S. Oregon/N. CA Coast coho); 63 Fed. Reg. 13,347 (1998) (threatened Lower Columbia and Central Valley, CA steelhead); 63 Fed. Reg. 42,587 (1998) (threatened Oregon Coast coho); 64 Fed. Reg. 50,394 (1999) (threatened Central Valley spring-run and CA Coastal chinook); 64 Fed. Reg. 14,308 (1999) (threatened Puget Sound, Lower Columbia and Upper Willamette chinook; endangered Upper Columbia spring-run chinook); 64 Fed. Reg. 14,508 (1999) (threatened Hood Canal summer-run and Columbia. chum); 64 Fed. Reg. 14,528 (1999) (threatened Ozette Lake sockeye); 64 Fed. Reg. 14,517 (1999) (threatened Upper Willamette and Middle Columbia steelhead); 65 Fed. Reg. 36,074 (2000) (threatened N. CA steelhead).

3. 58 Fed. Reg. 33,212 (1993) (Snake R. fall-run and spring/summer-run chinook and Snake R. sockeye); 58 Fed. Reg. 33,212 (1993) (Sacramento R. winter-run chinook); 64 Fed. Reg. 24,049 (1999) (Central CA and S. Oregon/N. CA Coast coho); 65 Fed. Reg. 7777-7779 (2000) (CA Coastal, Puget Sound, Central Valley spring-run, Lower Columbia., Upper Willamette and Upper Columbia spring-run chinook, Hood Canal summer-run and Columbia R. chum, Oregon Coast coho, Ozette Lake sockeye and Lower Columbia., Central Valley, Snake R., Upper Willamette, Middle Columbia, S. CA, South-Central CA Coast, Central CA Coast and Upper Columbia steelhead).

4. In Defenders of Wildlife v. Administrator, EPA, environmental groups challenged EPA's registration of strychnine for uses that led to the deaths of endangered black-footed ferrets. The court concluded that EPA's continued registration of strychnine caused a prohibited take of endangered species in violation of the ESA. During the course of the litigation, EPA consulted with the Fish and Wildlife Service on this pesticide registration. The Eighth Circuit recognized that a biological opinion resulting from such a consultation could insulate EPA from further ESA liability if it adhered to the opinion's mandatory conditions. Id. at 1301.

5. By regulation, NMFS has provided that, if the action agency determines that an action "may affect," but is "not likely to adversely affect" the listed species or its critical habitat, the consultation may be resolved without preparation of a biological opinion if NMFS concurs in writing in that determination. 50 C.F.R. § 402.13. If NMFS does not concur, or if the action agency has determined that the action is "likely to adversely affect" the listed species, the agency must conduct a formal consultation. Id. §§ 402.02, 402.14(a).

6. USGS found detections of two other pesticides — lindane and ethyl parathion — above aquatic life criteria. However, EPA has taken steps to phase out remaining registrations of these two pesticides.

7. Once EPA has taken more definitive steps to begin consultations, the Toxics Coalition will likely seek further relief to ensure that harm to salmon will be avoided during the time it takes NMFS to issue biological opinions on the pesticide uses and EPA to implement those biological opinions or otherwise ensure that its pesticide registrations will not jeopardize the survival and recovery of listed salmon or adversely modify their critical habitat.

END OF FOOTNOTES

Respectfully submitted this 4th day of May, 2001.

Respectfully submitted,

PATTI A. GOLDMAN (WSB #24426)

JAN E. HASSELMAN (WSB #29107)

Earthjustice Legal Defense Fund

705 Second Avenue, Suite 203

Seattle, WA 98104-1711

(206) 343-7340

(206) 343-1526 [FAX]

pgoldman@earthjustice.org

jhasselman@earthjustice.org

Attorney for Plaintiffs